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IN THE

Supreme Court of the United States

October Term, 1940.

No. 817.

ROYAL INDEMNITY COMPANY,
Petitioner,

AGAINST

UNITED STATES OF AMERICA,
Respondent.

BRIEF FOR PETITIONER.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

ROYAL INDEMNITY COMPANY,
Petitioner,

AGAINST

No. 817.

UNITED STATES OF AMERICA,
Respondent.

BRIEF FOR PETITIONER.

This is a suit by the United States to recover on a surety bond given by a taxpayer, as principal, to the Collector of Internal Revenue and is here on a writ of certiorari to the Circuit Court of Appeals for the Second Circuit.

Opinions of the Court Below.

The opinion of the District Court is in the record (R., pp. 22-24) and is unreported.

The opinion of the Second Circuit Court of Appeals is reported in 116 F. (2d) 247.

Jurisdiction.

The date of the judgment to be reviewed is December 26, 1940.

The writ of certiorari was granted by this Court on the 7th day of March, 1941. The jurisdiction of this Court is invoked under the judicial code, Section 240 (a) U. S. C. 347; as amended by the Act of February 13, 1939.

Cases believed to sustain the jurisdiction are:

General Electric Co. v. *Wabash Appliance Corporation*, 304 U. S. 364;
The Toledo Pressed Steel Co. v. *Montgomery Ward & Co.*, 307 U. S. 350.

Statement of the Case.

This is an action by the United States against the surety on a bond given by a taxpayer as principal to the Collector of Internal Revenue for the Second Collection District of New York (R., pp. 2-10).

The bond dated May 22, 1922, in the sum of $38,000.00 was given to obtain a stay of collection of an income tax deficiency for the year 1917, as to which the taxpayer had filed a claim in abatement with the Commissioner of Internal Revenue. The bond was conditioned on payment of so much of the deficiency as should not be abated with interest (R., pp. 11-12, Ex. B, p. 16).

Under date of February 18, 1925, the Commissioner of Internal Revenue sustained the claim in abatement in part and rejected it in the amount of $8,223.67. Demand was made by the Collector on the taxpayer for payment and upon his default, on the surety (R., p. 12).

On December 17, 1926, the surety paid to the collector by draft the sum of $8,223.67 in full settlement and for discharge of liability of the bond and the Collector so accepted the same. The draft bore on its face a notation that it was in full settlement of the taxes for 1917, and all liability under the bond. Thereafter and on December 20, 1926, the Collector cancelled the bond and transmitted it to the surety with a letter stating: "All liability

under this bond is hereby terminated." The surety then closed the case in its files (R., pp. 13-14, Ex. C, p. 17).

Thereafter and on September 23, 1932, the then Collector of Internal Revenue made demand upon the surety for the payment of an additional sum as interest. The surety refused to pay the same, or any other amount relying upon the payment and settlement of December 17, 1926, and the cancellation and return of the bond to it of December 20, 1926 (R., p. 14).

Thereafter and on April 27, 1935, this action was commenced, and upon the complaint, answer and agreed statement of facts each party moved for summary judgment (R., pp. 2-10, 19-21).

The District Court entered judgment for the respondent in the sum of $4,169.07 and denied recovery for legal rate of interest at 6% provided by New York State Law (R., pp. 22-26).

Both parties appealed to the Circuit Court of Appeals, the surety from the judgment entered against it and the United States from the denial of the legal rate of interest at 6% as provided by New York State Law (R., pp. 26-27).

The Circuit Court on petitioner's appeal affirmed the judgment of the District Court and on respondent's appeal modified the judgment to include interest at the rate of 6% per annum from December 17, 1926 (R., pp. 30-34).

Assignments of Errors.

The errors of the Circuit Court of Appeals are:

1. In holding that the Collector of Internal Revenue lacked implied power and discretion to cancel and discharge the surety from liability of the bond and return the bond to it and in affirming the judgment of the District Court of $4,167.07.

2. In holding that under the terms of the surety bond the surety was liable for a legal rate of interest at 6% provided by New York State Law from December 17, 1926.

3. In holding that, notwithstanding the laches of the respondent of approximately nine years in the institution and the prosecution of its claim, the United States is entitled to recover interest at the rate of 6% provided by New York State Law, from December 17, 1926 or from any other period.

4. In failing to enter judgment for petitioner and dismissing respondent's cause of action.

Summary and Order of Argument.

1. Petitioner contends that the Collector of Internal Revenue was vested with implied power and discretion to accept a surety bond in his name, as such collector, and cancel and return the surety bond to petitioner, and discharge it from all liability thereunder, such implied power and discretion is derived from his expressed power over the collection of taxes as provided by Section 3183 R. S.; and Section 1541 (a) 26 U. S. C. A., and to give receipts for all taxes collected as provided by Section 1549 (b) 26 U. S. C. A.

2. That the surety in any case is not liable for interest other than that provided by Internal Revenue Law, the only interest contemplated by the provisions of the surety bond and the parties thereto.

3. That the surety is not liable in any event for the legal rate of interest at 6% provided by New York State Law, or any other law, because not a part of the contract and in contemplation of the parties, and if interest is allowable at all, it is by way of damages and the respondent being guilty of gross laches of approximately nine years in instituting and prosecuting its claim, cannot recover such interest.

ARGUMENT.

POINT I.

The Collector of Internal Revenue was vested with implied power and discretion to cancel the surety bond and discharge petitioner from liability thereof and return the bond to it.

The argument follows in sequence with the summary of the argument.

The Collector of Internal Revenue is the only officer of the Government empowered and authorized to collect taxes. He is vested with exclusive jurisdiction over the collection of taxes. His authority is provided in the following section of the law: "It shall be the duty of the Collectors or their deputies, in their respective districts, and they are authorized to collect all the taxes imposed by law, however the same may be designated." Section 1541 (a) 26 U. S. C. A., Section 3183 R. S. derived from 13 Stat. 324, 14 Stat. 111.[1]

Collectors are authorized to give receipts for taxes provided as follows: "Every collector and deputy collector shall give receipts for all sums collected by him * * *" Section 1549 (b) 26 U. S. C. A.

The sole question presented under this point is whether the foregoing sections of the statute granting the collectors of Internal Revenue exclusive, expressed and supreme power over the collection of taxes, by implication, empowers him to accept a surety bond, stay collection, and terminate liability thereof.

---

1. 13 Stat. 239, Act of June 30, 1864, provided: That it shall be the duty of collectors aforesaid or their deputies, in their respective districts, and they are hereby authorized to collect all the duties and taxes imposed by this act, however the same may be designated" and as amended by the Act of July 13, 1866 (14 Stat. 111). "That it shall be the duty of the collectors aforesaid or their deputies, in their respective districts; and they are hereby authorized to collect all the taxes imposed by law however the same may be designated * * *."

The lower Courts have held that he has such power and if he has it must be by implication, because no expressed power is granted him in the statute. On this point in *U. S.* v. *Wolper*, 86 F. (2d) 715, the Court said: "It must be considered that there is no expressed authority for the collector to accept a bond under circumstances like those at Bar." The Circuit Court of Appeals below held that the collector possessed implied power to accept the surety bond saying: "He had implied authority to accept the bond." *United States* v. *Royal Indemnity Co.*, 116 F. (2d) 247, 248. The lower Courts have consistently held that such bonds accepted and approved by Collectors of Internal Revenue are valid and enforcible. *U. S.* v. *Fidelity and Deposit Co. of Maryland*, 80 F. (2d) 24, certiorari denied. *Fidelity and Deposit Co.* v. *U. S.*, 298, U. S. 665 and authorities there cited. It is observed that the collector was not expressly authorized to accept and approve such bond, however, the Courts have held them valid and enforcible and of course the result is that his acceptance and approval of the bonds is by implied power and in the exercise of discretion.

The lower Courts have also held that the Collector of Internal Revenue is vested with implied power and discretion derived from his exclusive, supreme, expressed broad powers over the collection of taxes, to discharge a surety from liability of a surety bond. This was held by the Circuit Court of Appeals of the Third Circuit, in *Hinemann Chemical Co.* v. *United States*, 92 F. (2d) 302, 303, 304, and although the decision was adverse to the government it acquiesced in the decision and did not apply for a review in this Court, and by the United States Court of Claims in *Brewerton* v. *United States*, 9 F. Supp. 503, 507, and although the decision was adverse to the government it did not apply for a review. In the *Hinemann Chemical Co.* case, the Court said:

"* * * The real question is whether or not the collector under the facts in this case, has authority to release the original bond for $43,350.00. If he did, the Court erred, for the collector did, as a fact, release the bond, and the question is whether or not he exceeded his authority * * *."

The Court continued:

"* * * Defendants say there is no expressed statutory authority conferred upon either the collector or commissioner to release a bond and the authority to do so must be implied as a necessary incident to the proper exercise of the authority expressly conferred upon them * * *."

The Court further said:

"It further appears that the collectors of Internal Revenue are the only persons expressly authorized to collect taxes * * *."

Section 3183 of the Revised Statutes provides that:

"Collection authority—(a) In general, in the district. It shall be the duty of the collectors or their deputies in their respective districts and they are authorized to collect all taxes imposed by law, however the same may be designated."

And the Court further said:

"* * * In view of the fact that the collector was the only person having statutory authority to collect the taxes from taxpayer, that the bond had been filed with him and all negotiations in regard to the taxes and bond had been with the collector, the

surety was justified in believing that the bond had been authoritatively released and rescinded and was so notified by the collector."

In the *Brewerton* case, the Court of Claims said:

> "* * * September 29, 1922 the Collector by letter advised the agents of the surety company: 'Since office letter dated September 11, 1922 was written, the schedule on which the allowance of the claim mentioned above has been received in this office, and the bond may be released.'
>
> "On the same date the Collector advised the taxpayer as follows: 'The bond may be released, as the tax liability for which it was issued has been terminated.' The bond was returned with the foregoing communication to the taxpayer * * *."

The Court then proceeded:

> "* * * In thus releasing the bond, the Collector was unaware that through the above adjustment and settlement the outstanding liability of $934.86 for 1918 for which the bond was issued had not been paid, and apparently the same was true of the plaintiff * * *."

The Court further saying:

> "Collection could have been made after the statutory period by recourse to the bond, had the bond remained in full force and effect. * * * The bond had however been cancelled and the Court finally said the collector was chargeable with the collection of taxes which have been assessed and to insure the performance of his duties, he is required to give bond. He was, therefore, not only the proper

party to advise the surety company of the status of the liability of which the bond was given, but also the proper party to determine when the bond could be released and authorize its release * * *."

After a careful research, counsel for the petitioner has been unable to find other authorities directly in point, but ample authorities in analogous cases cited *post*.

The opinion in these cases are reasonable and logical, the bond must be filed with the collector who has given bond to the government to insure the performance of his duties[2] and who, alone, is vested with exclusive, expressed power over the collection of taxes and thereby he is vested with all other power, implied power, necessary within his discretion, for the proper performance of his duties and one of such implied powers authorized him to cancel and return the bond to the surety. The taxpayer is not alone interested. The surety is vitally concerned. The bond in the case at Bar runs in his name as such collec-

---

2. Sec. 1733. Bonds—(a) Original execution. Every collector, before entering upon the duties of his office, shall execute a bond for such amount as may be prescribed by the Commissioner, under the direction of the Secretary, with not less than five sureties, to be approved by the General Counsel for the Department of the Treasury conditioned that said collector shall faithfully perform the duties of his office according to law, and shall justly and faithfully account for and pay over to the United States, in compliance with the order or regulations of the Secretary, all public moneys which may come into his hands or possession. (R. S. Sec. 3143; Mar. 1, 1879, c. 125, Sec. 2, 20 Stat. 327; May 10, 1934, c. 277, Sec. 512 [b], 48 Stat. 759.)

(b) Renewal. Every collector shall, from time to time, renew, strengthen, and increase his official bond, as the Secretary may direct, with such further conditions as the said Commissioner shall prescribe. (R. S. Sec. 3143; Mar. 1, 1879, c. 125, Sec. 2, 20 Stat. 327.)

(c) Substitution. Every collector shall execute a new bond whenever required so to do by the Secretary, with such conditions as may be required by law or prescribed by the Commissioner, with not less than five sureties; which new bond shall be in lieu of any former bond or bonds of such collector in respect to all liabilities accruing after the date of its approval by the General Counsel for the Department of the Treasury. (R. S. Sec. 3143; Mar. 1, 1879, c. 125, Sec. 2, 20 Stat. 327; May 10, 1934, c. 277, Sec. 512 [b], [c], 48 Stat. 759.)

(d) Filing. Said bonds shall be transmitted to the Secretary and filed as he may direct. (R. S. Sec. 3143; Mar. 1, 1879, c. 125, Sec. 2, 20 Stat. 327; Mar. 2, 1895, c. 177, Sec. 5, 28 Stat. 807.)

tor. The bond is filed with him and all negotiations with reference to the taxes and the bond are with collector and no other, and the surety is justified in relying on his actions and representations.

We think what this Court said in *United States* v. *Alexander*, 110 U. S. 325, 328, is applicable and appropriate to be quoted here:

> "It may be fairly presumed that sureties take indemnity from their principals. We cannot hold that after they have had notice of the discharge of the bond on which they are sureties and when their relation to their principals may have entirely changed, and their indemnity been surrendered, it is within the power of the Secretary of the Treasury without notice to them, to revive the bond and reimpose its obligation on them."

The presumption of law supports legality of collector's acts in terminating liability of the bond.

The presumption of law is that the Collector of Internal Revenue in terminating liability of the bond, acted legally and that his act is valid. *United States* v. *Chemical Foundation*, 294 F. 300, 326; *McCollum* v. *U. S.*, 17 ct. cl. 92; *S. Silberstein and Son* v. *U. S.*, 69 ct. cl. 373; *Davany* v. *Koon*, 45, Miss. 71; *Tainter* v. *Lucas*, 29 Wis. 375; *State ex rel.* v. *Prince*, 45 Wis. 610; See officers, Sec. 287, p. 1032, 46 C. J.

The government's acquiescence in the acts of collectors in accepting surety bond and terminating liability thereof, points persuasively to implied power in the collectors to do so.

The government has long recognized the practise of collectors in accepting and approving surety bonds, as is

evidenced by the many cases before the Courts,[3] and has acquiesced in their acts in rescinding and terminating liability of the bond and there is, no doubt, many cases of this kind not brought to attention. One of the acts of the collector in terminating liability of the bond and in which the government acquiesced, is that reported in *Hinemann Chemical Co.* v. *United States, supra*, which was decided adversely to the government and as heretofore stated, held that the collector was vested with implied power to terminate liability of the bond. This case was decided on the 27th day of September, 1937. The Government acquiesced in this decision and did not apply to this Court for a review. Another such case involving the act of the collector in terminating liability of the bond is that of *Brewerton* v. *United States, supra*, decided on the 14th day of January, 1935. The Government also acquiesced in this case and did not apply for a review. This action of the government persuasively points to implied power in the collector to terminate liability of a surety bond. On this point the Circuit Court of Appeals of Sixth Circuit said:

> "Acquiescence in officers' acts may persuasively point, in a doubtful case, to existence of power of the officer to forbid such acts, notwithstanding that such acquiescence does not confer such power on officers."
>
> "Acquiescence does not, of course, confer power, but it may, nevertheless, in a doubtful case point persuasively to its existence." *Royal Oak Drain District, Oakland County, Michigan*, v. *Keefe*, 87 F. (2d) 786, 793.

3. *United States* v. *Oswego Falls Corporation*, 113 F. (2d) 332; *United States* v. *Fidelity and Deposit Co. of Maryland*, 80 F. (2d) 24; *United States Concrete Conveyage Co.*, 42 F. (2d) 227; *United States* v. *Royal Indemnity Co.*, 116 F. (2d) 247; *Hinemann Chemical Co.* v. *United States*, 92 F. (2d) 302, 303, 304.

In the collection of taxes, the Collector of Internal Revenue is exclusive and supreme and is not a subordinate official of the government.

The Circuit Court of Appeals in its opinion, erroneously assumes that the Collector of Internal Revenue is a subordinate official of the government in the collection of taxes, as it fails to define his official position or status. It merely says: "It is well recognized that subordinate officials cannot surrender rights of the United States without expressed authority." Respectfully, this is an erroneous assumption. The Collector of Internal Revenue, in his sphere of collecting taxes is exclusive, superior, and supreme. He is made so by the statute solely conferring power and authority on him over the collection of the taxes. Section 1541 (a) 26 U. S. C. A., *supra*. No other person or officer of the government is vested with such power and, therefore, the collector has no superior, vested with power or authority to direct and control him in the performance of his duties in the collection of the taxes. This direction and control is the test as to whether he is a subordinate or superior officer.

State ex rel. Landis v. *Blake*, 110 Fla. 178, 181; 148 So. 566, 570;

People ex rel. Jacobus v. *Van Wyck*, 157, N. Y. 495, 506; 52 N. E. 559, 562;

Kane v. *Erie R. R. Co.*, 142 F. 682, 685, 73 C. C. A. 672;

In re Weaver, 131 N. Y. S. 144, 145; 72, Misc. 438.

In *State ex rel. Landis* v. *Blake, supra*, the Court said:

> "A subordinate officer is one who performs duties imposed on him under direction of a principal or superior officer * * *."

In *People ex rel. Jacobus* v. *Van Wyck, supra,* the Court said:

> "A subordinate official is one who performs the duties imposed on him under the direction of a principal or superior officer, or he may be an independent officer subject only to such directions as a statute lays on him, the compass of his duties is not determinate of classification, when the law imposed on him duties or requirements involving exercise of independent will, choice, or direction, beyond control of a superior, he ceases to be a subordinate officer * * *."

In *Kain* v. *Erie Railroad Co., supra,* the Court said:

> "Coming to the act, itself, the meaning of the first clause is plain. It states the Ohio Doctrine of superior and subordinate, every employee actually having authority to direct or control any other employee is not the fellow servant, but superior of such employee. To be such superior, it is not necessary that the employee shall have authority to direct or control more than one employee who is made his subordinate."

According to the Treasury Department, expressed authority is not granted to either the Commissioner of Internal Revenue or Collector of Internal Revenue to cancel and release liability of the bond and return it to the surety. G. C. M., 8980, Cum. Bull., X-1, p. 256. The way we construe this ruling, we believe the Department recognizes implied power vested in the commissioner and the collector to at least advise the surety that the bond has been satisfied for it says: "However, if the Bureau is satisfied that the taxpayer and/or the surety have paid the amounts of the tax and interest, and/or penalty covered by the bond in accordance with the terms of the extension granted, *the collector* or Bureau, may so advise

the surety." We contend that the foregoing is equivalent to a release or discharge of liability of the bond.

Since Collectors of Internal Revenue are vested with no expressed power to accept and approve surety bonds in the first instance, and since such bonds are held valid and enforcible, and since such collectors are vested with expressed or implied power in the performance of their duties; since it is held they are not vested with expressed power to accept and approve surety bonds, it is clear that they do so under their implied powers, derived from their broad, expressed, and exclusive powers to collect taxes.

It results, therefore, that the acceptance and approval of the bonds by the collectors are within the scope of their implied powers, and since they are valid and enforcible, it is therefore most logical that collectors are vested with implied power for all other purposes, including the recission and cancellation of the bond, in bringing the transaction once commenced, to a final conclusion, and surely no broader implied power is required for the collector to rescind a surety bond than to accept and approve such bonds in the beginning.

Exclusive expressed power is conferred on the Collector of Internal Revenue to collect taxes without direction of how the power is to be exercised. He is therefore vested with discretion in the execution of the power.

We think it is clear that the Collector of Internal Revenue is vested with a general grant of broad comprehensive powers over the collection of taxes, and in the execution and application of this power he is exclusive and supreme. It is also clear that the grant of power is unaccompanied by directions of how the power is to be exercised or the duties are to be performed, the words vesting the power are: "It shall be the duty of the collectors or their deputies, in their respective districts and they are authorized to collect all taxes imposed by law, how-

ever the same may be designated," *supra*. It is logical then, that the broad grant of power over the collection of all taxes without direction as to how the collection shall be made vests in the collector a broad discretion in the collection of the taxes and implies the right and duty in the collector to employ the means and methods necessary to comply with the expressed powers granted, and in the process of collection and execution of the power, includes the authority to accept a surety bond, stay collection, and cancel and discharge such liability of the bond.

On this point in *State* v. *Superior Court of King County*, 98, pp. 985, 990; the Court said:

> "The individuals holding these offices are required by law to perform certain definite governmental duties. It is a well recognized rule that a general grant of power or statutory direction to perform official duties unaccompanied by definite directions as to how the power is to be exercised or the duty performed, implys the right and duty to employ the means and method necessary to comply with the statutory requirements." Citing: 2 Lewis Sutherland Statutory Construction, 942, Sec. 508, Throop on Public Officers, 515, Sec. 545.

In *State* v. *Hildebrant*, 93 Oh. 1, 11, 12, it is said: "If the Constitution of the States commands a public officer to do a particular thing without directing the manner in which it shall be done, and the legislature has failed to pass facilitating legislation, it necessarily follows: that the officer required to perform this duty has implied authority to determine in the exercise of a fair and impartial discretion the manner and method of doing the thing commanded.

The United States Court of Claims in *Thompson* v. *U. S.*, 9 ct. cl. 187, 197, 198, said: "The distinction that should be made seems to be that where a statute ex-

pressly defines the powers, it is notice to the world, but where a statute confides discretion to an officer a party dealing with him in good faith may assume the discretion is properly exercised * * *."

In *American Stores Co.* v. *U. S.*, 68 ct. cl. 128, is somewhat similar to the case at Bar. The Act of July 11, 1919 (40 Stat. 85) vested a general grant of broad powers in the Secretary of War over the sale of surplus property in these words: "To sell surplus property upon such terms as may be deemed best.[4] The Court held that discretion was vested in the Secretary of War to adopt the means and methods in making the sale and this included cancellation of sales made, refunds, and adjustments, and held that he was a general agent with general powers and to sustain its position quoted from 2 C. J. 608, Sec. 243 as follows: "A general agent with full authority to represent the principal in a given locality, or to manage a particular branch of the principal's business, is more than a mere sales agent and where the conduct of his agency reasonably requires power to modify the contract he makes, Courts have often held the right so to do, to be within his implied powers." To the same point see also *Levy* v. *U. S.*, 63 ct. cl. 126; *U. S.* v. *West Point Grocery Co.*, 30 F. (2d) 941.

In *Levy* v. *U. S.*, *supra*, involved the same section of the Act as in *American Stores Co.* v. *U. S.*, *supra*, and the Court held: "That under the broad grant of power there was necessarily conferred upon local boards created in the War Department under the Secretary of War full and ample discretion in the mode and manner of handling the sales."

In *United States* v. *Corliss Steam Engine Company*, 91 U. S. 321, 322, 323, involved settlements of contracts made by the Secretary of the Navy for work performed,

4. Sale of War Supplies: "That the President be, and he hereby is authorized; through the head of any executive department, to sell, upon such terms, as the head of such department shall deem expedient to any person, partnership, association, corporation * * *." (40 Stat. 85) Act of July 11, 1919.

involving the Act of April 30, 1798 (1 Stat. 553),[5] conferring certain powers without direction as to how the power should be executed and the Court held that the Secretary was vested with implied power and discretion in executing the expressed power conferred and upheld a cancellation of a contract and settlement made with the contractor.

To the same point, see: *Great Falls Mfg. Co.* v. *Atty. Gen.*, 124 U. S. 581, 596, 597; *Maryland Steel Co.* v. *United States*, 235, U. S. 451, 459; *United States* v. *Mason and Hangar Co.*, 260, U. S. 323, 325; *Wells* v. *Nickles*, 104, U. S. 444; *Brooks* v. *U. S.*, 39, ct. cl. 494, 505; *Haynes* v. *Butler*, 30 Ark. 69; *Reliance Mfg. Co.* v. *Board of Prison Commissioners*, 161 Ky 135, 142; *State ex rel.* v. *Younkin*, 108 Kansas, 634, 638; *State ex rel. Bybee* v. *Hackmann*, 276 Mo. 110, 116; *State* v. *District Court*, 19 N. D. 819; 435, 835; *Kasik* v. *Janssen*, 158 Wis. 606, 609, 610; *City of Wilburton* v. *King Atty. Gen.*, 18 P. (2d) 1075, 1076; *Mayor etc. of N. Y.* v. *Sands*, 105 N. Y. 210, 217, 218, 219, 220.

Respectfully the opinion of the Circuit Court of Appeals is erroneous.

The Circuit Court of Appeals, below, held that, notwithstanding lack of expressed authority in the act that the collector was vested with implied power to accept the bond as follows: "He had implied authority to accept the bond," but no implied authority to terminate it, and for authorities to sustain its opinion on this point, cites: "*Hart* v. *United States*, 95 U. S. 316, respectfully we submit that this is not a case in point and not analogous to the fact situation of the case at Bar, or to the statute involved."

5. The Act of April 30, 1798 (1 Stat. 553) provided: "That there shall be an executive department under the denomination of the Department of the Navy, chief officer of which shall be called the Secretary of the Navy, whose duty it shall be to execute such orders as shall be received from the President of the United States, relative to the procurement of Naval stores and materials and the construction, armament, equipment, and employment of vessels of war, as well as all other matters connected with the Naval establishment of the United States * * *."

The statute involved in the *Hart* case expressly prohibited the removal of distilled spirits from a distillery warehouse before the payment of the tax,[6] and plainly, there could be no inference or suggestion of implied power or discretion in the government officer to permit its removal without payment of the tax and for violation of the act, heavy penalties were provided involving acts of omission and commission,[7] and of course under no circumstances, could the question of implied power arise, as in the instant case.

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6. 15 Stat. 130, Sec. 15, provided: "And be it further enacted, that every distiller shall provide, at his own expense, a warehouse, to be situated on and to constitute a part of his distillery premises, to be used only for the storage of distilled spirits, of his own manufacture; but no dwelling house shall be used for such purpose, and no door, window, or other opening shall be made or permitted in the walls of such warehouse leading into the distillery or into any other room or building; and such warehouse, when approved by the Commissioner of Internal Revenue, on report of the Collector, is hereby declared to be a bonded warehouse of the United States, to be known as a distillery warehouse, and shall be under the direction and control of the Collector of the district, and in charge of an Internal Revenue storekeeper assigned thereto by the Commissioner of Internal Revenue; *and the tax on the spirits stored in such warehouse shall be paid before removal from such warehouse.*"

7. 15 Stat. 140, Sect. 36, provided: "And be it further enacted, that all distilled spirits found elsewhere than in a distillery or distillery warehouse, not having been removed therefrom according to law, shall be forfeited to the United States; and in any case of the seizure of any distilled spirits found elsewhere than in a distillery, distillery warehouse, or other warehouse for distilled spirits authorized by law, or in the store or place of business of a rectifier or of a wholesale liquor dealer, or of a compounder of liquors, or in transit from any one of said places; and in case of the seizure of any distilled spirits found in any one of the places aforesaid, or in transit therefrom, which shall not have been received into or sent out therefrom in conformity to law, or in regard to which any of the entries required by law to be made in the books of the owner of such spirits, or the storekeeper, wholesale dealer, rectifier, or compounder, have not been made at the time or in the manner required, or in respect to which the owner or persons *having possession, control, or charge of said spirits shall have omitted to do any act required to be done or shall have done or committed any act prohibited in regard to said spirits, the burden of proof shall be upon the claimant* of said spirits to show that no fraud has been committed, and that all the requirements of law in relation to the payment of the tax has been complied with and any person who shall remove or shall aid or abet in the removal of any distilled spirits on which the tax has not been paid, to a place other than a distillery warehouse provided by law, or who shall conceal or aid in concealment of any spirits so removed, or who shall remove or shall aid or abet in the removal of any distilled spirits from any distillery warehouse or other warehouse for distilled spirits authorized by law, in any manner other than is provided by law; or who shall conceal or aid in concealment of any spirits so removed shall be liable to a penalty double the tax imposed on such distilled spirits so removed or concealed and shall on conviction be fined not less than two hundred dollars, nor more than five thousand dollars, and imprisoned not less than three months nor more than three years."

The statute in this case is not one conferring broad powers without direction in executing the power as in the case at bar, but is a statute conferring power with complete direction as to its execution. Compare them.

The case of the *United States* v. *Globe Indemnity Co.*, 94 F. (2d) 576, respectfully does not support the Circuit Court of Appeals in its opinion, because if the petitioner is correct in the argument made and position taken in the case at Bar then this case is governed by the same argument and same authority, because the same statute granting power to the collector to collect taxes was also involved in this case, that is Section 1541 (a) 26 U. S. C. A., *supra*. The Second Circuit Court of Appeals said that it was distinguishable from the *Hinemann Chemical Co.* case.[8] It is distinguishable on the facts, because in the *Hinemann Chemical Co.* case there was a definite act of the collector in recission of the bond, while in the *Globe Indemnity Co.* case, there was no definite act of the collector in rescinding the bond and returning it to the surety. The only act of the collector involved, is that of making a tax search and the Second Circuit Court of Appeals said that he was not required to do so under the law. It is, therefore, not a case in point.

Ritter v. *United States*, 3 Cir., 28 F. (2d) 265, 267, respectfully is not a case in point. This case involved a field auditor of the government who without either expressed or implied authority and clearly contrary to the directions in the statute, advised a taxpayer that it was not necessary to file a formal claim for a refund with the Commissioner of Internal Revenue to recover an overassessment of taxes paid. The sections of the statutes in-

8. "The decision in *United States* v. *Hinemann Chemical Co.*, 3 Cir., 92 F. (2d), 302, holding that a collector had authority to release a bond given to stay execution and accept a new one, does not govern the present situation. It may be that an official having authority to take a bond can accept another in substitution for it and release the earlier obligation. * * * The right to bind the commissioner by a tax search which a collector furnishes is a different matter."

volved in this case are quoted below.[9] This case, therefore, did not involve a statute granting broad powers to an officer without direction in the execution of those powers as is involved in the case at Bar, but involves the invalid act of an auditor of the government which was plainly contrary to the expressed provisions of the statute and the question of implied power or discretion vested in him to do so, did not and could not arise.

The Circuit Court of Appeals, below, discusses the cases of *Brewerton* v. *United States* and *Hinemann Chemical Co.* v. *United States, supra,* and intimates that they are valueless as authorities in supporting the contention of the petitioner that implied authority and discretion was vested in the Collector of Internal Revenue to rescind the bond, because the Circuit Court of Appeals of the Third Circuit in the *Hinemann Chemical Co.* case and the United States Court of Claims in the *Brewerton* case had mistakenly applied *United States* v. *Alexander*, 110 U. S. 325, as an authority.

The doctrine of implied authority and discretion in a government officer was not involved in the *Alexander* case. The authority of the Secretary of the Treasury involved in that case was expressed in the statute, both as to the power granted and direction in the exercise of the power in that it expressly authorized him not only to decide the case but to rescind and cancel the bond and, therefore, is not analogous to the case at Bar on the facts or with

9. Section 1113 (26 U. S. C. A., Sec. 156) provides: "That no suit or proceeding shall be maintained in any Court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or any sum alleged to have been excessive, until a claim for refund has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulation of the Secretary of the Treasury established in pursuance thereof."

Section 1112 of the Revenue Act of 1926 (26 U. S. C. A., 157) provides: "That all claims for the refund of any internal revenue tax alleged to have been erroneously or illegally assessed or collected or any sum alleged to have been excessive, or in any manner wrongfully collected, must, * * * be presented to the Commissioner of Internal Revenue within four years after the payment of such tax."

reference to the act involved, conferring broad powers in the collector over the collection of the taxes. Petitioner contends that it makes no difference whether or not *United States* v. *Alexander, supra,* was misapplied as an authority, because the proper construction of the statute conferred power on the collector over the collection of the taxes, grants the collector by implication broad powers and discretion in the execution of the power conferred, which was not involved in the *Alexander* case, however, it is clear that the Circuit Court of Appeals in the *Hinemann Chemical Co.* case and United States Court of Claims in the *Brewerton* case grounded their decision mainly upon the provisions of the Revised Statutes, Section 3183 and Section 1541 (a) 26 U. S. C. A., *supra.* See quotation from the cases, pp. 7-9, *ante.*

The Circuit Court of Appeals refers to and discusses the question of compromise. Most respectfully, we submit that this point is not involved in the case at Bar and can have no effect in determining the sole question presented, the implied power and discretion vested in the collector to terminate liability of the bond. If this Court determines that the collector in the exercise of implied power and discretion discharged the liability of the bond then the question of compromise falls by the way, and if the Court should hold that the collector was without implied power and discretion to discharge liability of the bond, again the question of compromise would fall by the way. Therefore, it cannot have any effect on the ultimate decision to be made and is clearly beside the point.

Therefore, the expressed, exclusive supreme power vested in the collector over the collection of the taxes without direction of how the power shall be exercised, impliedly vests in him the additional power and discretion necessary for the due and efficient exercise of the powers expressly granted and this includes implied power

and discretion to accept a surety bond and discharge liability thereof and this power is fairly implied from the grant of expressed power conferred.

See *County of Wilson* v. *National Bank*, 103 U. S. 770, 778; *Dooley* v. *Pennsylvania Railroad Co.*, 250 F. 142, 143, and the implied power of the statute is much a part of it as that which is expressed.

POINT II.

Interest.

Points 2 and 3 made in the summary of the argument will be treated together.

The interest claimed by respondent is that provided by New York General Business Law, Consol. Laws, c. 20, Sec. 370,[10] as damages for breach of contract. This interest, it is clear, is not provided for in the bond (See bond Exhibit "B" to Stipulation of Facts, R., 16) and therefore not a part of the contract and cannot be recovered as such, and if recoverable at all, it is by way of damages for the detention of money after it is due.

Interest is the compensation allowed by law, or fixed by the parties for the use or forbearance of money, *or as damages for its detention. Loudon* v. *Shelby County Taxing District*, 104 U. S. 771, 774; *New Orleans Ins. Association* v. *Piaggio*, 16 Wall. 378, 386; *Hiatt* v. *Brown*, 15 Wall. 177, 185, 186.

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10. Section 370. New York Gen. Bus. Law.

"The rate of interest upon the loan or forbearance of any money, goods, or things, in action, except as otherwise provided by law, shall be six dollars upon one hundred dollars, for one year; and at the rate for a greater or less sum, or for a longer or shorter time."

The New York Courts in construing this statute have held: that interest is only allowed when there is a contract, express or implied to pay interest, or as damages for the non-payment of money due. *Matter of New York, etc., Bridge*, 137 N. Y. 95. Claims unliquidated do carry interest. *Sloan* v. *Baird*, 162 N. Y. 327. Interest may be waived by acceptance of principal; *McCreery* v. *Day*, 119 N. Y. 1; *Cutter* v. *New York*, 92 N. Y. 166.

The law allows interest only on the ground of a contract, express or implied for its payment, *or as damages for the detention of money*, or for the breach of some contract, or the violation of some duty. *Morley* v. *Lake Shore, etc. R. Co.*, 146 U. S. 162, 168; *New York Trust Co.* v. *Detroit, etc. R. Co.*, 251 F. 514; *Herman H. Hettler Lumber Co.* v. *Olds*, 242 F. 456, 459.

The undisputed facts of the case at Bar discloses that respondent is guilty of gross laches in asserting, instituting suit, and prosecuting its claim to recover such interest. It was approximately nine years after the accrual of the right to claim interest as damages, December 17, 1926, the date of the settlement of the liability of the bond and December 20, 1926, the date of the cancellation of the bond before respondent instituted suit to recover the interest, April 27, 1935. (See date of complaint, R., 7-8, date of cancellation of bond, R., 13-14). Since the interest, if recoverable at all, must be recovered as damages, the law is well settled that respondent is not entitled to recover because of laches in asserting and prosecuting its claim.

The rule is, there can be no recovery for damages, interest, which might have been prevented by reasonable and diligent efforts on the part of respondent in promptly asserting and prosecuting its claim. *Warren* v. *Stoddard*, 105, U. S. 224, 229; *Wicker* v. *Hoppock*, 6 Wall. 94; *Western Real Estates Trustees* v. *Hughes*, 172 F. 206, 211; *Lillard* v. *Kentucky Distillers and Warehouse Co.*, 134 F. 168, 178.

In the case at Bar, the respondent has delayed for a period of nine years after the accrual of the right of action to recover interest, without any excuse, just, or otherwise, before prosecuting claim for interest, and almost eighteen years after the taxes were due. The law is well settled that where such interest is claimed as damages the laches of respondent is a bar to recovery.

U. S. v. *Sanborn*, 135 U. S. 271, 281, 282; *Redfield* v. *Ystalyfera Iron Co.*, 110 U. S. 174; *Redfield* v *Bartels*, 139 U. S. 694; *Mason* v. *Walkowich*, 150 F. 699, 700, 706; *Jouralmon* v. *Ewing*, 80 F. 604, 607, 608; *Stewart* v. *Schell*, 31 F. 65, 66; *Mitchell* v. *Kelsey*, F. Cas. No. 9, 664. The same rule has been held by this Court to apply to the United States, *U. S.* v. *Sanborn, supra.*

The basis for the bar to recover interest is grounded in damages and because of the laches of the party claiming it to assert and enforce his rights thereto and not at all on the merits or demerits of the principal claim which it appears the Circuit Court of Appeals thought.

The cancellation and return of the bond to the surety does not surrender the rights of the government against the taxpayer, principal on the bond for the taxes and interest due, nor the collector from the obligations of his bond which he has given for the protection of the government, and the faithful and diligent performance of his duties, unless such actions on account of the long delay and laches of the respondent are barred by the Statute of Limitations.

There is no statute of limitation applicable to the action of the case at Bar in so far as petitioner has been able to ascertain after a careful research. However, there is Statutes of Limitations as a bar to recovery of taxes, refunds, interest, and many other actions,[11] both for and against the government, and following the policy of the statute of limitations to bring all transactions and right

11. Limitation to bring actions against the United States in U. S. Courts and Court of Claims is generally six years. Section 41 (20) (Judicial Code, Section 24 Amended), Section 262, Title 28, Code Laws, U. S. 1934 Ed.

Limitation of actions against sureties in certain cases is five years. Section 5, Title 6, Code Laws, U. S. 1934 Ed.

Limitation actions, U. S. Court of Claims, generally six years. Section 262, Title 28, Code of Laws, U. S. 1934 Ed.

Limitation on assessment of Internal Revenue tax, four years. Proceedings in Court to collect tax, five years. Section 1432 (a), Title 26, Code of Laws, U. S. 1934 Ed.

Limitation on estate tax, three years, suits in Court, three years. Section 474, Title 26, Code of Laws, U. S. 1934.

of actions thereon to a close, there should be a limitation to the action of the case at Bar. The equities of the instant case should be considered in the light of all these circumstances.

The judgment of the Second Circuit Court of Appeals, below, should be reversed, and the cause remanded to the District Court for the Southern District of New York, with instructions to dismiss the complaint with judgment against respondent for costs sustained in the cause.

Respectfully submitted,

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